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# Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 54.

MARTIN CONBOY, AS TRUSTEE IN BANKRUPTCY OF THE PHILLIP SEMMER GLASS COMPANY, LIMITED, BANKRUPT,

*Appellant,*

*against*

THE FIRST NATIONAL BANK OF JERSEY CITY,

*Appellee.*

## BRIEF FOR APPELLANT.

MARTIN CONBOY,
*Of Counsel.*

EVENING POST JOB PRINTING OFFICE, NEW YORK.

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MARTIN CONBOY, as Trustee in Bankruptcy of the PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt,
Appellant,

AGAINST

THE FIRST NATIONAL BANK OF JERSEY CITY,
Appellee.

Brief for Appellant.

This is an appeal under Section 25-b of the Bankrupt Act (pp. 26 to 28) from an order of the United States Circuit Court of Appeals for the Second Circuit affirming a decree of the District Court of the United States for the Southern District of New York, which in turn affirmed the decision of a referee in bankruptcy in that district, allowing the claim of the First National Bank of Jersey City against the estate of the above-named bankrupt (p. 17).

## Statement.

On March 18, 1903, a petition in bankruptcy was filed against the Phillip Semmer Glass Company, Limited, in the District Court of the United States for the Southern District of New York, and a receiver was appointed on the same day. An order of adjudication was subsequently entered.

For some time prior to the filing of the petition, the bankrupt had an account of the ordinary and usual deposit character with the First National Bank of Jersey City, the appellee, and the receiver, on the day the petition was filed, served a certified copy of the order of his appointment on the bank. On that day the balance on deposit to the credit of the alleged bankrupt was $6,232.96. At the same time the bank held unmatured promissory notes, made by various makers, in favor of the bankrupt, which notes, upon endorsement by the bankrupt and in the ordinary course of business, had been discounted by the bank for the bankrupt's account, the bankrupt receiving thereon a sum largely in excess of the balance above mentioned. A schedule of the notes is found on page 30 of the record. The bank applied the balance *pro tanto* to the payment of the notes, and filed a claim for the remainder, amounting in all, including interest and fees, to $9,080.03. The notes all fell due within one year after the adjudication in bankruptcy, and as they matured payment thereof, respectively, was duly demanded and refused and notice of protest given to the bankrupt as endorser.

Upon presentation of proof of claim by the bankrupt (pp. 12-13), the trustee filed formal objections thereto and petitioned for its disallowance on the ground

> "5. * * * that the said bank had not the right to offset and counterclaim the amounts due upon unmatured paper upon which the claim of said bankrupt appeared as endorser against the amount due upon de-

> posit to the said bankrupt at the time of the filing of the petition in bankruptcy, for the reason that the respective obligations did not constitute mutual debts and mutual credits between the estate of the bankrupt and a creditor; that at the time of the filing of the said petition the account could not be stated and one debt set off against the other within the meaning of the Bankruptcy Statute" (p. 15).

Other grounds were stated in objection to the claim (pp. 14-16), but we shall present no other to this court.

After proofs taken and a hearing had, the referee rendered an opinion in favor of the validity of the claim (pp. 2-5), and an order was entered allowing it (p. 5). This ruling was subsequently affirmed by the judge of the District Court on petition to review (p. 17). An appeal was then taken to the Circuit Court of Appeals for the Second Circuit, which affirmed the previous orders in the case, the opinion being *per curiam* (p. 20), and an order to this effect was entered on January 23, 1905 (p. 21).

Although the order of the Circuit Court of Appeals was appealable to this court, *(Western Tie & Timber Company* v. *Brown, 196 U. S., 502; Rector* v. *City Deposit Bank, 200 id., 405)* no findings of fact and conclusions of law were made and filed, as required by General Order in Bankruptcy No. XXXVI, (3), and the judgment remained in this incomplete state until the present appeal was perfected, when such findings and conclusions were made and filed on June 14, 1905.

It was the holding of the learned Circuit Court of Appeals that

> "To determine * * * whether the holder of a claim is entitled to the benefit of Section 68, it is necessary only to inquire whether his claim is one provable in bankruptcy" (p. 20).

This opinion seemed at variance with the determination of this court in *Western Tie & Timber Company* v. *Brown, supra*, and, accordingly, on May 8, 1905, the trustee presented a petition for rehearing to the Court of Appeals, and this petition, having been duly considered by the court at the same term, was on May 24, 1905, denied (p. 24).

On May 27, 1905, a petition for an appeal to this court was presented to Mr. Justice Peckham and allowed, and a certificate was signed by him to the effect that, in his opinion, a determination by this court of the question involved in connection with the claim of the bank was essential to a uniform construction of the bankrupt law throughout the United States (p. 28). Errors were assigned, and the Circuit Court of Appeals having, as aforesaid, filed its findings of fact and conclusions of law (pp. 29 to 31), the appeal papers were filed in the office of the clerk of that court, and an appeal, conformably to Section 25-b of the Bankrupt Act, thereby perfected.

When the record was forwarded to this Court at the last term, a motion was made by the appellee to dismiss or affirm, the motion to dismiss being based on the contention that there was no jurisdiction in this Court to entertain the appeal, in view of the limitation fixed by General Order in Bankruptcy XXXVI, which provides as follows:

> "2. Appeals under the Act, to the Supreme Court of the United States from a Circuit Court of Appeals * * * shall be taken within thirty days after the judgment or decree and shall be allowed by a judge of the court appealed from or by a justice of the Supreme Court of the United States."

Briefs were submitted, and the Court reserved the motion for further argument at the hearing upon the merits.

Before proceeding to the specifications of error

it is desirable, therefore, to discuss the propriety of this appeal.

## The appeal was properly taken.

The case was not finally disposed of by the Circuit Court of Appeals until the adjournment of the term at which the judgment was rendered. All judgments and decrees are under the control of the Court during that period, and may be opened or revised.

The petition for rehearing was addressed to the discretion of the Court. The Court duly considered it. By this the effect of the final decree was suspended. Substantially, the decree was not final until the 24th day of May, 1905, within thirty days from which date the appeal was perfected.

*Brockett et al.* v. *Brockett, 2 How., 238.*

In most of the Federal circuits the time in which the petition for rehearing must be presented has been limited by local rules; thus in the first circuit, a petition must be presented within one month; in the fifth, twenty days; sixth, thirty days; seventh, thirty days; and in the ninth, fifteen days after opinion or judgment.

The only provision governing petitions for rehearing in the second circuit is that contained in original rule 29 of the Circuit Court of Appeals, limiting the time for the presentation of such petition to the term at which the judgment is entered.

In accordance with the rule of the second circuit, the petition in question, as shown by the order denying the application for rehearing was presented at the term at which the judgment was entered, and therefore, under the decisions of this Court, operated as a suspension of the judgment until a determination thereon had been had by the Circuit Court of Appeals.

**The time to appeal from the final decree did not begin to run until the petition for rehearing had been decided.**

*Aspen Mining & Smelting Company v. Billings, 150 U. S., 31.*
*Voorhees v. Noye Manufacturing Company, 151 U. S., 135.*

Counsel for appellee, in connection with the limitation of time fixed by the General Order, contends that the short period of thirty days within which an appeal must be taken is intended to prevent the tying up of bankrupt estates by prolonged litigations over disputed claims. It will also doubtless be contended that in the cases cited by the appellant, holding that the time for appeal dates from the denial of a petition for rehearing, a rehearing in each instance was prayed for before the time for appeal had expired, whereas in the case at bar, owing to the short limitation of the time for appeal fixed by General Order XXXVI, the petition for rehearing was not presented until after the time for appeal prescribed by that General Order had expired. The next step in this contention will be that no court has power to extend the time for appeal after it has once expired. A similar contention was formerly made with regard to the shorter period of ten days within which, under the former provisions of the Judiciary Act, an appeal must be perfected, in order that it might operate as a *supersedeas*. The courts had no power to extend the time for allowing the supersedeas, after the time prescribed by statute therefor had expired. (*Kitchen* v. *Randolph, 93 U. S., 86.*) But this court has uniformly held that the ten days fixed by the former requirement and the sixty days now fixed by the provisions of the Judiciary Act within which a *supersedeas* may be allowed do not begin to run until a petition for re-

hearing or a motion to set aside the decree has been disposed of, and has so held in cases where the petition for rehearing was not filed until the time for *supersedeas* after the original judgment had expired.

The *Slaughter-House Cases, 10 Wall., 273*, were on writs of error to the Supreme Court of the State of Louisiana.

> "Petitions for rehearing were filed by the losing parties on the 26th of April, 1870, and on the 9th of May following an entry was made in each case that the petition for rehearing was refused. Writs of error to the state court were subsequently prayed by the same parties, and, on the 13th of May, last, the writs of error were allowed by the Associate Justice of this court, allotted to that circuit, and they were duly filed on the 16th day of the same month, as appears of record.
>
> "Filed as the writs of error were, within ten days from the date of the entry refusing the petition for rehearing, it is claimed by the plaintiffs that the several writs of error operate as a supersedeas and stay execution, under the twenty-third section of the Judiciary Act. Doubts were at one time entertained upon that subject, but since the decision in the case of Brockett *v.* Brockett (2 How., 238) the question must be considered as settled, in accordance with the views of the plaintiffs."
>
> Mr. Justice Clifford in *Slaughter-House Cases, 10 Wall., 289.*

See also *Railroad Company* v. *Bradleys, 7 Wall., 575*; and *Memphis* v. *Brown, 94 U. S., 715.*

In the latter case the judgment, granting a peremptory mandamus, was entered on March 2nd, 1876. Afterwards, during the same term, May 20th, the city appeared and moved the Court to set aside the order of March 2nd; but this motion

was refused and that order re-entered as the final judgment of the Court in the premises. A writ of error was sued out upon this last judgment, and a supersedeas perfected, by giving the required bond within sixty days thereafter.

This Court, by Chief Justice Waite, ruled that

> " • • • the motion made during the term to set aside the judgment of March 2 suspended the operation of that judgment, so that it did not take final effect for the purposes of a writ of error until May 20, when the motion was disposed of."
>
> *Memphis* v. *Brown, 94 U. S., 715, 716, 717.*

*Texas & Pacific Railway Company* v. *Murphy, 111 U. S., 488,* was on a motion to dismiss the writ of error united with a motion to affirm. The facts, as shown in the opinion of Chief Justice Waite, were as follows:

> "On the 29th of May, 1883, a judgment was entered by the Supreme Court of Texas affirming a judgment of the District Court of Harrison County. The following entry appears in the record under date of December 21st, 1883:
>
> " 'Appeal from Harrison.
>
> " 'THE TEXAS PACIFIC RAILROAD COMPANY v. JAMES MURPHY. } No. 422. Case 1111.
>
> " 'Opinion of the Court delivered by Mr. Justice Slayton. Mr. Chief Justice Willie not sitting in this cause.
>
> " 'Motion of the appellant for a rehearing in this cause came on to be heard, and the

same having been considered by the Court, it is ordered that the motion be overruled and the hearing refused; that the appellant, the Texas Pacific Railway Company, pay all the costs of this motion.

* * * * * *

"'It is expressly ruled in *Brocket* v. *Brocket*, which has been followed in many cases since, that if a petition for rehearing is presented in season and entertained by the Court, the time limited for an appeal or writ of error does not begin to run until the petition is disposed of. Slaughter House Cases, 10 Wall., 273, 289; Memphis *v.* Brown, 94 U. S., 715, 717. The motion for rehearing in this case was not decided until December 21st, and the writ of error was sued out and served within sixty days thereafter. This was in time to secure the supersedeas.'"

*Texas & Pacific Railway Co.* v. *Murphy, 111 U. S., 488, 489, 490.*

Of course, if the petition for a rehearing is not presented by a party who is entitled to present it, as in *Sage et al.* v. *Central Railroad Company et al., 93 U. S., 412, 418, 419;* or if it is not presented at the proper term, as in *Cambuston* v. *United States, 95 U. S., 285, 287,* so that the Court cannot entertain it, then the Court's disposition of it does not affect the original judgment. But the disposition of such a motion or petition when it is presented by a party entitled to do so within the proper time is in effect a re-entry of the original judgment appealed from.

The principle for which we are contending is nowhere expressed more simply or clearly than by Chief Justice Fuller as follows:

"* * * if a motion or a petition for rehearing is made or presented in season and entertained by the Court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree

> does not take final effect for the purposes of the writ of error or appeal. Aspen Mining & Smelting Co. *v.* Billings, 150 U. S., 31; Voorhees *v.* Noye Manufacturing Co., 151, U. S., 135; Brocket *v.* Brocket, 2 How., 238, 249; Texas & Pacific Railway *v.* Murphy, 111 U. S., 488; Memphis *v.* Brown, 94 U. S., 715; Northern Pacific Railroad *v.* Holmes, 155 U. S., 137."
>
> *Kingman* v. *Western Manufacturing Co., 170 U. S., 675, 678.*

Independently of the above considerations from which we draw the general conclusion that a possible rehearing is a necessary incident to every judgment or decree the right to which cannot be cut off during the term except by express statute or rule of Court, we submit that, in view of the irregular character of the judgment as entered, the time within which it might be appealed from had not begun to run up to the prosecution of this appeal.

A judgment or decree must be properly entered, in order to start the statute of limitation of the time to appeal.

> *Polleys* v. *Black River Improvement Co., 113 U. S., 81, 83.*
>
> *Rubber Company* v. *Goodyear, 6 Wall., 153.*
>
> *Yznaga Del Valle* v. *Harrison et al., 93 U. S., 233.*
>
> *United States* v. *Gomez, 1 Wall., 690.*

Where an appeal to this Court is permitted by the Bankrupt Act from a determination of the Circuit Court of Appeals, the judgment is not properly entered until the mandatory provision of subdivision 3 of General Order XXXVI has been complied with. The "making and filing" of the findings of fact and conclusions of law referred to therein is a necessary prerequisite to the proper entry of the judgment.

While these findings are not a part of the judgment itself, they are a formal prerequisite to its proper entry and, though they may be filed *nunc pro tunc* as of the date of the original entry of judgment, (or this is true, at least, of findings in a trial court, [*Insurance Co.* v. *Boon*, 95 *U. S.*, 117.]), yet the judgment is not properly entered until the date when they are actually made and filed.

The obvious purpose of subdivision 3 of the General Order in question is to relieve the Supreme Court of the onerous labor of examining lengthy records. The entry of the findings *nunc pro tunc* fully meets such a purpose, but, as the judgment is not properly entered until they have been filed, the date of the judgment for the purposes of limiting the time to appeal does not recur to the original entry of the judgment.

We, therefore, maintain that, in view of the fact that this appeal was instituted within thirty days from the entry of the order denying the petition for rehearing, this Court has jurisdiction to entertain this appeal. And, further, that, on account of the irregularity in the judgment, the time within which the proceedings on appeal should have been perfected had not expired when this appeal was taken.

## Specification of Errors.

The issue raised by the proof of claim and the objections thereto was:

> Whether it is permissible, under the provisions of the Bankrupt Act, for a bank holding a balance on deposit to the credit of the bankrupt to utilize the same as a set-off against promissory notes endorsed by the bankrupt, which had not matured at the time of the filing of the petition in bankruptcy.

This issue the referee states and disposes of as follows:

> " * * * we have remaining only the question as to whether the fact that the notes here were unmatured at the time of the filing of the petition in bankruptcy eliminates that quality of mutuality which is required by Section 68, in order to permit of set-off.
>
> "The trustee's contention is that on the day of the filing of the petition there was no such mutuality; that there was, on that day, a debt due by the bank to the bankrupt, but no debt due by the bankrupt to the bank. He further contends that immediately upon the filing of the petition in bankruptcy other and paramount equities in favor of the general creditors of the bankrupt intervened, and became superior to the equities existing between he bankrupt and the bank; and immediately thereupon the fund in the bank became impressed with a trust in favor of the general creditors of the bankrupt and could not be retained by the bank alone.
>
> "The trustee in support of this contention cites authorities of the New York and Pennsylvania Courts, and there is no doubt that under the statutes of those States the law is as he declares it to be. But the Bankruptcy Act creates a different rule of set-off, or rather, perhaps, better, adds to the classes of cases to which the rule is to be applied.
>
> "At common law, and under the Statutes of New York and of other States, it is well settled that there can be no set-off unless the mutual debts are both due and payable in the hands of the parties for and against whom set-off is sought, that is to say, that unless they are presently payable as well as due the requisite mutuality does not exist (Munger *v.* Albany City Bank, 85 N. Y.. 580-586). Under the Bankruptcy Statute, however, by Section 63a, a debt is declared provable against the bankrupt estate, that

is, I take it, for the purposes of bankruptcy, payable out of the estate, although not by its terms payable until after the filing of the petition, if only it is absolutely owing at that time. The operation of this section seems to be to hasten in such cases, and for the purposes of bankruptcy administration, the maturity of the debt. * * *

"It seems to be the provability of the debt which is the criterion of its availability for the purposes of set-off. * * * The fact that Section 68b prohibits a set-off of any debt which is not provable would point inferentially to the same conclusion.

* * * *

"Nor should we overlook the use of the term 'mutual credits' in addition to the term 'mutual debts' in Sec. 68. While these terms are to be used as correlatives (Libby *v.* Hopkins, 104 U. S., 303), they are not to be construed as meaning one and the same thing (Lord Kenyon in Atkinson *v.* Elliott, 7 T. R., 378). The term mutual credits first appears in the English Bankruptcy System in the year 1705 (4 and 5 Anne, C. 17, Sec. 11), and it has been found in all of our bankruptcy acts from the beginning (Act of 1800, Sec. 42; Act of 1841, Sec. 5; Act of 1867, Sec. 20; U. S. R. S., Sec. 5073). It has from the first been considered of importance, and as adding materially to the cases which were held comprised under the term mutual debts.

* * * *

"On the whole, I conclude that the mutuality required by the Bankruptcy Act existed, and that the off-set was proper" (pp. 3 and 4).

The reasoning of the Circuit Court of Appeals is in the same vein. The *per curiam* opinion, in quoting Section 1, Subdivision 11 of the Bankruptcy Law, which provides that the word "debt" when used in said act "shall include any debt, demand

or claim provable in bankruptcy," applies the section as as follows:

> "That meaning must be given to the word when used in the set-off section (68): 'In all cases of mutual debts or mutual credits between the estate of the bankrupt and a creditor the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid.' To determine therefore whether the holder of a claim is entitled to the benefit of Section 68 it is necessary only to enquire whether his claim is one provable in bankruptcy" (p. 20).

This being the theory upon which the claim of the bank was allowed, we place our assignment of error on the ground that the rulings of the courts below were based upon an erroneous construction of the provisions of the Bankrupt Act relating to set-off.

## POINT I.

### Under the Bankrupt Law, the liability of the bankrupt as endorser upon unmatured promissory notes cannot be offset against a deposit owing to the bankrupt at the time of the filing of the petition.

The provisions of the present Bankrupt Act, relating to offset and counterclaim, are found in Section 68, which is as follows:

> "Set-offs and counterclaims. (*a*) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a

creditor the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid.

(*b*) A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."

This section is practically identical with a like section in the former bankrupt acts (*Act of 1800, Sec. 42; Act of 1841, Sec. 5; Act of 1867, Sec. 20; U. S. R. S., Sec. 5073*), and goes back to the original English Bankrupt Act (*4 and 5 Anne, c. 17, Sec. 11*). It would be somewhat interesting to trace the origin and history of the doctrine of set-off, which first appears in the civil law under the name of *compensatio*, and is now adopted and preserved as the law of those countries where the principles of the civil law prevail (*Code Nap., Lib. 3, Tit. 3, Chap. 4, Sec. 398; Code Civ., 1289, 1291; Inst. of Law of Spain, Lib. 2, Tit. VI, ch. 5, Sec. 4; Vanderlinden's Inst. Law of Holland, Lib. 1, c. 18, Sec. 4*). It was a doctrine that was not known or adopted in the common law of England, though Chancery recognized the right, and the Statutes of set-off (*2 Geo. II, c. 27, Sec. 13; 8 Geo. II, c. 24, Sec. 76*) were passed mainly to obviate the necessity of a resort to Chancery in every case of mutual independent claims upon both sides (*Blake* v. *Langdon, 19 Vt., 485*).

In the civil law when the doctrine of compensation was invoked, all matters in dispute between the parties were adjusted (*Blake* v. *Langdon, supra*). All that was required was that "the debt or claim to be compensated should be certain, de-

terminate and actually due and in the same right and of the same kind as that of the other side." (*Story's Eq. Jurisprudence, Secs. 1440, 1441*). As debts of which the time of demand had not arrived were not compensated with those which were due, the right of compensation did not arise from the making o' a contract or the creation of an indebtedness, but only from the time when mutual debts became due. (*Domat, Part 1, Book 4, Tit. 2, Sec. 2, par. 2298*). In this respect, compensation, which, as we have said, was the prototype of the doctrine of set-off, differed from reconvention (Waterman on Set-off, Sec. 628).

The practice of set-off was recognized by courts of equity long before it was known to courts of law, and consequently the equity jurisdiction is not based upon any statutes of set-off and would exist as well without any such statutes as it now does, the doctrine having been taken directly from the civil law.

The primitive notion of an action at law did not admit the possibility of a defendant being an actor and interposing a claim against the plaintiff to be tried in the one suit. Lord Mansfield undertook to give a reason for this condition. He said:

> "Natural equity says that cross demands should compensate each other by deducting the less sum from the greater, and the difference is the only sum which can be justly due, but positive law, for the sake of the forms of proceedings and convenience of trial, has said that each must sue and recover separately in separate cases."

The want o' such a doctrine at law was found to result in great injustice. Lord Mansfield declared:

> "That the natural sense of mankind was first shocked at this doctrine in the case of bankrupts. They thought it hard that a person should be bound to pay the whole

that he owed to a bankrupt and receive only a dividend of what the bankrupt owed him." Green *v.* Farmer, 4 Burrows, 2214, 2220.

The defense of set-off was provided for in England in law cases, as above indicated, by the statutes of set-off, 2 Geo. II and 8 Geo. II, and some subsequent statutes were passed mainly to obviate the necessity of a resort to chancery in every case of mutual independent claims upon both sides (*1 Petersd. Abr.* (*417*), *301, and note*). The general statute of set-off of 2 Geo. II was restricted to mutual debts, while that in regard to bankrupts extended to mutual credits. In regard to the latter statute, the administration of which was altogether under the supervision of the court of chancery, that court has exercised both an equitable and legal jurisdiction (*Blake* v. *Langdon, supra*).

The right of set-off beginning with the doctrine of *compensatio* in the civil law (*Gai. IV, 61*) was early introduced into the administration of English justice by the courts of equity and first adopted by express legislation in bankruptcy proceedings in 1705. The extension of the doctrine to include mutual debts and mutual credits under the Bankrupt Act harmonized the practice with that of the chancery court, and put in practice in bankruptcy cases the civil law doctrine of *compensatio* to the extent that that doctrine had been adopted by the equity courts. It is, therefore, unnecessary to discuss the defense of set-off, as applied in common law cases, because it is impossible to conceive of a common law action involving a bankrupt estate without at the same time supposing the application of the Bankrupt Act. The discussion, therefore, narrows itself down to an application of the doctrine of equitable set-off to the case at bar. It

may be said, in passing, that by Sec. 2, Subdivision 15, of the Bankrupt Act, express equitable jurisdiction has been conferred upon courts of bankruptcy in the administration of the act.

Before entering upon the discussion proper, it is desirable to set forth some general principles applicable to this provision of bankrupt law, which have already been laid down by this court.

Mr. Justice Miller, in construing the provisions of the act of 1867, in relation to set-off and counterclaims, said:

> *"This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it."*
>
> *Sawyer* v. *Hoag, 17 Wall., 610, 622.*

In the case of *Libby* v. *Hopkins, 104 U. S., 303,* Mr. Justice Woods, in writing the opinion of the court, distinguished the American Bankrupt Act from the English Bankrupt Act (5 Geo. II), and held that the terms credits and debts were used as correlatives in our statute, stating that a debt on one side was a credit on the other. *"So that the term 'credits' cannot have any broader meaning than the term 'debts.'"*

*Libby* v. *Hopkins, 104 U. S., 303, 309.*

Under the same statute, Mr. Justice Bradley, construing the same section, held that a claim of set-off could be maintained only upon some general principle of equity recognized by the courts of equity in cases of set-off. In effect his decision declared that the use of the terms "mutual debts" and "mutual credits" in the act allowed only an application of the legal and equitable doctrines that had already been fixed by the courts of law and equity *and nothing more.*

*Gray* v. *Rollo, 18 Wall., 629, 632.*

These cases determine conclusively that the Bankrupt Act does not create a new law of set-off, and indicate quite clearly that no cases for the application of that doctrine are permitted by the act other than those which have always been permitted by courts of equity.

This is important, in view of the fact that there is nothing definitive in the section of the Bankrupt Act relating to set-off; nothing to indicate the exact jurisdiction of the bankruptcy court in applying the doctrine.

What, then, is the doctrine of courts of equity respecting an offset of a matured against an unmatured claim?

The equitable doctrine is well expressed in cases involving claims against insolvent estates, and State courts in such cases have frequently applied the rule that a matured claim against a creditor of the estate cannot be offset against an unmatured claim owing by the estate.

In *Beckwith against Union Bank, 9 N. Y., 211,* the plaintiff, an assignee for the benefit of creditors, sued to recover the balance of $3,600, which at the time of the assignment was standing to the credit of the insolvent firm as depositors in the Union Bank of New York. The facts showed that on the 24th day of August, 1850, the assignors had executed to the plaintiff a general assignment of all their property and effects in trust for the benefit of their creditors. On the 19th of July previous, the bank had discounted for the assignors a bill of exchange for $3,914 drawn in favor of the assignors, and by them endorsed. The bill matured on the 27th of August, three days after the assignment, and having been protested for non-payment, the bank charged it against the assignors in their account and claimed to have thereby applied the deposit in payment. On the following day the plaintiff gave notice of the assignment and de-

manded the funds. The referee before whom the cause was tried reported a judgment in favor of the plaintiff for the amount claimed, and the judgment on his report having been affirmed at General Term, defendant took the appeal. After disposing of the question of set-off as affected by the provision of the Code of Civil Procedure, Johnson, *J.*, of the Court of Appeals held with respect to the assumed right of the bank to apply the amount on deposit in payment of the amount due upon the protested paper, as follows:

> "Nor had the bank any lien upon the deposits of the Hunters which would have prevented their drawing out the whole balance of cash to their credit on the 24th of August. This right passed to the plaintiff by the assignment; no notice was necessary to perfect that right in the assignee, except only that, in default of notice, the bank might have so dealt, as by its subsequent acts, to have affected its rights; there is no evidence of any such dealing in the case."
>
> *Beckwith* v. *Union Bank, 9 N. Y., 211, 212.*

The facts discussed in the above case are identical with the facts in the case *sub judice* and the expression of law seems to us to be just as applicable.

The same opinion has been expressed in many subsequent cases in the New York Court of Appeals down to a very recent date, and is the law of that State to-day.

> "The general rule relating to this subject is that claims or demands sought to be set-off must not only be mutual to the extent that they are owing by each to the other, but they must be due and payable, and, therefore, a claim not due cannot be set-off against one that may be presently enforced. To this rule there are perhaps some excep-

tions, as in the case of the insolvency of one of the parties, or where an assignment has been made. And yet, even in those cases, the party claiming the right of set-off is not entitled to such relief unless his claim has matured before the assignment or transfer (*Martin* v. *Kunzmuller*, *37 N. Y., 396, 397*; *Jordan* v. *Nat. S. & L. Bank*, *74 N. Y., 467*; *Fera* v. *Wickham*, *135 N. Y., 223*; *Matter of Hatch*, *155 N. Y., 401*)."

*DeCamp* v. *Thomson*, *159 N. Y., 444, 448.*

"In other words, if there is no right of set-off when an insolvent assignment is made, it cannot arise afterwards in favor of a creditor. Cross demands which do not mature until after such an assignment, could not have been the subject of set-off, when the assignment was made; for a demand *in presenti* is necessary to an allowance by way of set-off.

I think the logical and natural extension of the principle of the decision in Meyers *v.* Davis is authoritative in the decision of the present case. The right of set-off must attach at the time of the making of the assignment. It cannot arise afterwards, for the reason that the claim in favor of the estate has passed to the assignee, and to allow a set-off would be to the prejudice of other creditors. I think the principle to which we should adhere is this: When a party asks to have a set-off against a demand upon him held by an assignee for the benefit of creditors, a claim against the insolvent estate, it will be allowed, provided his was a claim upon the estate, due when the assignment was made; upon the ground, that by reason of the existence of cross demands at the time of the assignment, which were due (or might have become due at the creditor's election), an equitable adjustment by set-off is made without interfering with the equities of others. But after the estate has passed to an assignee upon a trust to hold for and dis-

tribute, among creditors, the former and natural equity disappears in superior equities vesting in the general body of creditors. They are then interested in having equality of distribution, and if a creditor, who, when the assignment was made, had no right to any off-set, may be allowed it afterwards, he gains a preference. By the intervention of the right of third persons, under the assignment, the equities change with the change in the situation of the original parties, to the misfortune of the creditor holding the demand against the insolvent estate, but, nevertheless, in accordance with the equitable principles as I deduce them from the decisions."

*Fera* v. *Wickham, 135 N. Y., 223, 229.*

"The principle upon which the rule proceeds is, that in case of mutual debts it is only the balance which is the real and just sum owing by or to the insolvent. Hence, when the assignee in this case became vested with the assets of his insolvent assignor, he took the contract above mentioned which had not then matured into a claim or right of action, but which did mature in his hands some years thereafter. He acquired no greater right than his assignor had prior to the assignment, had the claim then matured, and since Huntingdon had prior to the assignment a valid existing set-off against what the assignee took, that right was not lost or impaired by the assignment. The rights of the parties being adjusted in equity as of the date of the insolvency, all the assignee took as assets was the balance subsequently accruing on the contract, after deducting Huntingdon's debt due against the assignor before the rights of creditors intervened.

Had Huntingdon's debts accrued after the insolvency, as that of the assignee did, then equity would not permit the set-off and the case would come within the rule laid down in Fera *v.* Wickham (*supra*), but, as already

shown, such was not the case. When the debt of the party claiming the set-off does not exist when the insolvent estate passed into the hands of a trustee for creditors, but accrued subsequently during the administration of the estate, then the equities of other creditors will intervene to prevent the depletion of the assets in the hands of the trustee by extinguishing a good debt due to the estate by a bad one due to the creditors from the estate. In all cases of mutual debts, it is the insolvency of one of the debtors and the rights of the other creditors in the assigned estate that equity takes notice of, and modifies the legal right of set-off accordingly in order to promote equality and justice. But that condition of things exists only from the time when the assignment takes effect, and while it is the general rule in the administration of insolvent estates that equality among creditors is equity, yet the Court will not ignore the principle that it is only the balance in case of mutual debts or obligations which is the real sum owing by or to the insolvent, and the assets in the hands of the trustee for distribution to creditors are measured by this rule. Equity always regards as done what ought to have been done, and hence in this case it applies the past due debt of Huntingdon existing at the time of the assignment, upon his unmatured obligation in the hands of Hatch which passed to the trustee (*Hughitt* v. *Hayes, 136 N. Y., 163*).

This is the rule that prevails with respect to the right of set-off in the Supreme Court of the United States. In *Scott* v. *Armstrong* (*146 U. S., 499*) the receiver of an insolvent national bank sought to recover upon a note which fell due after his appointment. The maker of the note claimed a right to set off against his obligation a sum of money deposited to his credit with the bank prior to the insolvency. The precise question certified to the court for its decision was this: 'Where a national bank becomes in-

solvent and its assets pass into the hands of a receiver appointed by the Comptroller of the Currency, can a debtor of the bank set-off against his indebtedness the amount of a claim he holds against a bank, supposing the debt due from the bank to have been payable to a time subsequent thereto? The court answered the question in the affirmative and in delivering the opinion the learned chief justice said: 'Where a set-off is otherwise valid it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted, which can justly be held to form part of the assets of the insolvent. * * * The state of case where the claim sought to be set off is acquired after the act of insolvency is far otherwise, for the rights of the parties become fixed as of that time, and to sustain such a transfer would defeat the object of these provisions. The transaction must necessarily be held to have been entered into with the intention to produce its natural result, the preventing of the application of the insolvent's assets in the manner prescribed."

*Matter of Hatch, 155 N. Y., 401, 405.*

In *Mfrs. Nat. Bank* v. *Jones, 2 Pennyp. (Pa.), 377*, it was held that a bank garnishee of the deposit account of an insolvent had no right to insist upon set-off for an unmatured claim.

In *Chipman* v. *National Bank, 120 Pa., 86*, an assignee for the benefit of creditors brought suit to recover the amount which the assignor had deposited in defendant bank, and the bank sought to set-off notes due it which did not mature until after the assignment. The Court there declared that at the date of the assignment the bank had no lien or set-off against the amount then deposited, and that as a creditor of the assignor, holding notes that matured after all the property, including money on

deposit, had passed to the assignee in trust for all creditors, the bank was in no better condition than they were.

The logic of these cases is that the debt from the creditor becomes vested in the representative of the insolvent by operation of law for the benefit of all the creditors of the insolvent, while the creditor claiming the set-off holds only an obligation of the insolvent.

Our contention, therefore, is, that when a party asks to have his claim against an insolvent estate set off against a demand upon him held by a trustee for the benefit of creditors, it will not be allowed unless his claim upon the estate was due when the assignment was made. The allowance of his claim, if due, is placed upon the ground that by reason of the existence of cross demands at the time of the assignment, which were due or might have become due at the creditor's election, an equitable adjustment, by way of set-off, is made without interfering with the equity of others. (*Munger* v. *Albany City National Bank, 85 N. Y., 580.*) But if the estate has passed to a trustee upon a trust to hold for and distribute among creditors, the former and natural equity disappears in a superior equity, vesting in the general body of creditors. The latter are then interested in having equality of distribution, and if a creditor, who, when the assignment was made, had no right of set-off, is allowed it afterward, he gains an actual though not a technical preference. By the intervention of the rights of third persons, under the assignment, the equities change with the change in the situation of the original parties, to the misfortune, perhaps, of the creditor holding the demand against the insolvent estate, but, nevertheless, in accordance with equitable principles.

*DeCamp* v. *Thompson, 159 N. Y., 444.*

*Matter of Hatch, 155 id., 401.*
*Fera* v. *Wickham, 135 id., 223.*
*Hughitt* v. *Hayes, 136 id., 163.*
*Newcomb* v. *Almy, 96 id., 308.*
*Jordan* v. *National Shoe, etc., Bank, 74 id., 467.*
*Martin* v. *Kunzmuller, 37 id., 397.*
*Myers* v. *Davis, 22 id., 489.*
*Beckwith* v. *Union Bank, 9 id., 211.*
*Bradley* v. *Angel, 3 id., 475.*
*Oatman* v. *Batavian Bank, 77 Wis., 501.*
*Union Nat. Bank* v. *Hicks, 67 Wis., 192.*
*Jones* v. *Pienning, 85 Wis., 264.*
*Spaulding* v. *Backus, 122 Mass., 553.*
*Brown* v. *New Bedford Bank for Savings, 137 Mass., 262.*
*Bosler* v. *Exchange Bank, 4 Pa. State, 32.*
*Manufacturers National Bank* v. *Jones, 2 Pennyp., 377.*
*Chipman* v. *National Bank, 120 Pa. State, 861.*
*Appeal of Farmers, etc., Bank, 48 Pa. State, 57.*
*Huse* v. *Ames, 104 Mo., 91.*
*Homer* v. *National Bank of Commerce, 140 Mo., 225.*
*Lockwood* v. *Beckwith, 6 Mich., 168.*
*Mechanics' Bank* v. *Stone, 115 Mich., 648.*
*Fuller* v. *Stieglitz, 27 Ohio State, 355.*

The indebtedness, therefore, of an insolvent debtor which matures after his assignment for the benefit of creditors, cannot be the subject matter of set-off against his assignee. (*Martin* v. *Kunz-*

*muller, supra; Fera* v. *Wickham, supra; Huse* v. *Ames, supra.*)

A set-off is enforceable against an assignee for the benefit of creditors only when it is a demand which became due from the assignor at or before the making of the assignment. (*Fera* v. *Wickham, supra.*)

If no right of set-off exists when an assignment by an insolvent debtor for the benefit of creditors is made, it cannot afterward arise in favor of one indebted to the insolvent estate who is also a creditor. If, therefore, there was among the assets transferred by such an assignment a demand against one who, at the time the assignment was made, held a demand against the assignor which had not then matured, he is not entitled to a set-off although his claim against the estate matures before that against him. (*Fera* v. *Wickham, supra.*)

Of course, a set-off is permitted where the debt owing to the insolvent is not due. (*Bradley* v. *Angel, 3 N. Y., 755; Jones* v. *Peinning, 85 Wis., 264; Stevens* v. *Schuchermann, 32 Mo. Appeals, 333; Jones* v. *Robinson, 26 Barb., 310; Yardley* v. *Clothier, 51 Fed. Rep., 506; Drake* v. *Rollo, 3 Biss., 273; Kentucky Flour Co., etc.,* v. *Mercantile National Bank, 90 Ky., 225.*) Otherwise expressed, a set-off will be allowed in equity on the application of the complainant, where the defendant is insolvent, although the debt of the complainant to the defendant is not due, but it will not be allowed if the debt of the defendant to the complainant is payable at a future day. (*Bradley* v. *Angel, supra; Lindsay* v. *Jackson, 2 Paige, 581; Chance* v. *Isaacs, 5 Paige, 592; Coster* v. *Griswold, 4 Edw. Ch., 364, 374; Hill* v. *Holbrook, 4 Id., 539.*) This distinction is explained as follows: *An assignee of an insolvent debtor "has no authority to waive the time of credit secured for the benefit of his*

*assignor and pay a debt not due with credits or the avails of credits which are due to the assignor at the time of making the assignment, for to do so would tend to prejudice the creditors of the insolvent estate, but a debtor to such estate, whose debt was not due at the time of the making of such an assignment, has the authority to waive the time of credit which was secured for his own benefit and pay the same at once in money or by way of set-off of the amount due him from such estate."*

*Jones* v. *Peinning, 85 Wis., 264, 267,*
per Cassoday, *J.*
*Hughitt* v. *Hayes, 136 N. Y., 163.*

Out of accord with these decisions, we find the case of *Nashville Trust Co.* v. *Bank* (*91 Tenn., 336, 354*), which holds that the insolvency of a party is a good ground of equitable set-off, even where the indebtedness on one side is not due, and that it makes no difference in which party's favor is the unmatured debt. It is said in this case that the supposed hardship or injustice resulting from the anticipation of the unmatured debt may and should be wholly obviated by discounting it or adding interest to the due debt for the unexpired term of the debt not due, and in this way equalize the interest. It must be observed, however, that the legal right in such a case is with the holder of the matured obligation and against the owner of the unmatured liability, and there is certainly as strong a natural equity that the whole of the estate of the insolvent should be distributed ratably among the creditors as that a part of the assets should be first set apart and appplied to compensate the particular debt of the complainant. Where the equities are as strong on one side as the other, the legal right must be left to prevail. (*Change* v. *Isaacs, 2 Edw. Ch., 348, 357.*)

The great weight of authority, as indicated by

the above cases, is with the principle contended for. Whether the decisions are placed upon the principle that the greater equity is with the assignee for the creditors and against the single claim, or whether the equities are considered equal as between the assignee and the claimant, and, in this situation, the maxim that equity follows the law is applied, nevertheless, they are all in accord in reaching the rule that an unmatured claim against an insolvent cannot be utilized as a set-off against a matured claim in favor of the insolvent.

The Referee practically admitted that if the case were to be decided by the authority of State decisions, the trustee's contention was well supported, and, as he seems to place reliance upon certain Federal authorities, it is desirable to consider them to determine whether they are out of harmony with those of the State courts.

*Myer* v. *Dickinson*, *107 Fed. Rep.*, *86*, is not authority for the Referee's decision. There is nothing in the case to indicate whether the notes held by the bank matured before the institution of the bankruptcy proceedings, the statement of facts in the case merely indicating that the notes in question were unmatured at the time the general assignment was made by the bankrupt under the State law preceding the institution of the bankruptcy proceedings. The Court practically recognized the law of set-off as administered in the courts of Pennsylvania. The statement at the end of the opinion that the bankruptcy proceedings having intervened "another and different rule of set-off applies," may refer to the maturity of the notes in the *interim* between the making of the general assignment and the institution of the bankruptcy proceedings.

In *Ex parte Howard National Bank*, *2 Lowell*, *487*, cited by the Referee as sustaining that portion of his opinion which holds that under Section 20

of the Act of 1867 such an offset as is sought to be secured by the bank in this case was upheld, Judge Lowell did not have this question before him. What he really decided was that the deposit in the bank should be set off against the aggregate amount of notes of the bankrupt, irrespective of any question of priority in the application of payments. In like manner in the case of *In re H. Petrie et al.*, 7 *N. B. R.*, *332*, cited by the Referee on the same point, the facts differed in the essential particular of maturity of the obligation to the bank. The draft in that case, which was offset against the deposit, became due a month before the institution of the proceedings in bankruptcy.

It is true that in the case of *In re Kalter*, *2 N. B. N.*, *264*, such an offset as is sought in this case was upheld on the ground that the provability of the debt is the criterion of its availability for the purposes of set-off. This decision was rendered by a Referee in the Eastern District of Pennsylvania, and the cases that he cited in support of his conclusion he expressly explains are without bearing upon the point.

In *Hough* v. *First National Bank of Ft. Wayne*, *4 Bissell*, *449*, the obligation of the bank had matured at the time it received the payment complained of.

In *Demmon and ano.* v. *The Boylston Bank*, *5 Cush.*, *194*, cited by the Referee in *In re Kalter*, *supra*, the note must have been due on the institution of the insolvency proceedings for the reason that it was dated January 3rd, 1848, and was due one month after its date, while the petition in insolvency was not filed until February 4th, 1848.

It is true that some unmatured obligations have been permitted to be offset against matured obligations under former bankrupt statutes, but we assert from a careful examination of the authorities that the only instances in which such application has been permitted by the Court were where

it was the debts owing *by* the bankrupts which were due at the time the petition was filed and the debts owing *to* the bankrupts did not mature until subsequent to that date. As already explained, the courts have held in such cases that the creditors of the bankrupts, upon the maturity of the obligations to them, might declare the debts owing *by* them to be due at that time and thus permit an offset of the character in question, and to this class of cases belongs *In re City Bank of Savings, Loan & Discount, 6 N. B. R., 71.* There the debt due to the creditor was payable at the time of the insolvency, and it was the amount owing by him to the bankrupt that became due subsequently. The courts permit offsets in such cases on the theory that the creditor chooses to declare his obligation to the bankrupt due and thereby the necessary mutuality is secured.

We believe that the reason our effort to secure judicial acquiescence in our contention has been so far unsuccessful is owing to the fact that we have been met with much *dicta* in reported cases and unconsidered reflections of text writers. The principal and most obvious example of this is the following statement of the text of Lowell on Bankruptcy:

> "Section 258. Banker and Customer.
>
> "Though bankers are bound to honor their customers' checks to the extent of his cash balance, without regard to his liability on running bills or notes, yet as soon as he becomes bankrupt there is a lien or right of set-off for those liabilities, whether they have matured or not."
>
> *Lowell on Bankruptcy, page 194.*

In support of this text there is cited the case of *Alsager* v. *Currie, 12 M. & W., 751,* decided in 1844 (7 Vict.), at a time when the English Bankrupt

Act was 6 George IV, Chapter 16; Section 50 of which, relating to set-off, was as follows:

> "L. And be it enacted, That where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him, and what shall appear due on either side or the balance of such account, and no more, shall be claimed or paid on either side, respectively, *and every debt or demand hereby made provable against the estate of the bankrupt may also be set-off in manner aforesaid against such estate;* provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed."

And in the very next section it is provided:

> "LI. And be it enacted, That any person who shall have given credit to the bankrupt upon valuable consideration, for any money or other matter or thing whatsoever, which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note or other negotiable security or not, shall be entitled to prove such debt, bill, bond, note or other security, as if the same was payable presently, and received dividends equally with other creditors, etc."

It is to be observed that the above statute expressly declares that every provable debt shall be the subject of set-off, and had it been desired to make every provable debt the subject of set-off in the American Act, Congress would not have al-

iowed the law to be framed as it is at the present time. It is evident that the decisions rendered under a bankrupt act entitling every provable debt to be set-off are not applicable to an act which permits only mutual debts or mutual credits between the estate of the bankrupt and the creditor to be the subject of set-off.

Again, Lowell cites the case of *Jones* v. *Pienning*, *85 Wis., 264*, in support of the same text. That was a case where the bank made a voluntary assignment while holding notes of a depositor, and it was held that the latter was entitled to have the amount of his deposit set-off against the amount of the notes though they were not due at the time of the assignment. In passing upon the question raised in that case, the Supreme Court of Wisconsin said:

> "Undoubtedly the rights of the creditors and debtors of an insolvent assignor as to set-offs became fixed immediately upon the completion of the assignment, in analogy to the rule applicable to debtors and creditors in the cases of deceased insolvents (*Union National Bank* v. *Hicks*, *67 Wis., 192*). Accordingly, it has been held by this court that a bank cannot set-off against a deposit to the credit of an assignor for the benefit of creditors, a note held by it against him but not due at the time of the assignment (*Oatman* v. *Batavian Bank*, *77 Wis., 501; 20 Am. St. Rep., 136*). For the reasons for the rule see the opinion of Mr. Justice Orton in the case last cited. To the same effect is the decision of this court in *Kinsey* v. *Ring*, *83 Wis., 536;* and see, also, *Fera* v. *Wickham*, *135 N. Y., 223*.
>
> "The case at bar differs largely from that class of cases, and turns upon a different principle. Here it was the indebtedness of the insolvent debtor that was not due when the assignment was made, but a portion of the indebtedness from the plaintiffs to the assignee of the insolvent debtor. An assignee of such insolvent debtor has no author-

> ity to waive the time of credit secured for the sole benefit of his assignor and pay a debt not due to the assignor at the time of making the assignment, for to do so would be to prejudice the creditors of the insolvent estate; but a debtor to such estate whose debt was not due at the time of making such assignment has the authority to waive the time of credit which was secured for his own benefit, and pay the same at once in money or by way of set-off of the amount due him from such estate. The rule is firmly settled in other States, and has in effect been sustained by this court (*Lindsay* v. *Jackson, 2 Paige, 581; Smith* v. *Felton, 43 N. Y., 419; Smith* v. *Fox, 42 N. Y., 677; Rothschild* v. *Much, 115 N. Y., 1; Richards* v. *La Tourette, 119 N. Y., 54; McCagg* v. *Woodman, 28 Ill., 84.*" *Jones and ano.* v. *Pienning, 85 Wis., 264, 267.*

It will be seen from the foregoing that not only is the text unsupported in so far as it purports to be a decision of this point by the case cited, but, on the contrary, the doctrine is absolutely condemned by the Wisconsin court.

Since these cases cannot be reconciled with the opinion appealed from, it will be claimed that the Court of Appeals of New York has recognized a distinction between State and Federal rules of set-off, and that in the application of the bankrupt law there is not wanting any uniformity of decision. On the motion to affirm, made at the October Term, 1905, counsel for the appellee cited the then recent decision in the New York Court of Appeals of *Frank* v. *Mercantile National Bank, 182 N. Y., 264,* where the opinion was rendered by Chief Judge Cullen, who states expressly that:

> "If the defendant's right depended on the equitable rule of set-off as it obtains in this state, it is clear that the notes held by it, which had not matured at the time of

> the transfer of the title from the bankrupt to his assignee, could not be set off against the plaintiff's claim, *Fera v. Wickham* (*135 N. Y., 223*) is a conclusive authority to that effect, and so the respondent's counsel concedes."

The learned Court of Appeals, speaking by its chief judge, holds, however, that a different principle of set-off is required to be applied by the terms of the bankrupt law, and cites mainly those cases in the circuit and district courts which have already been examined in this memorandum in the discussion of the referee's opinion.

We had occasion, in the Circuit Court of Appeals, to discuss these decisions with the result that that court based its opinion upon the definition of the word "debt" contained in Section 1, Subdivision 11 of the Act, which it read into Section 68 providing for set-off. Upon the oral argument, one of the judges stated that the former decisions of this Court were based upon the law of 1867, which provided no definition for the term "debt," and so made applicable the ordinary equitable principles of set-off.

The Court of Appeals of New York has gone further, however, in this connection, and in the course of his opinion Chief Judge Cullen observes:

> "Moreover the very point seems to have been decided by the Supreme Court of the United States in *Scammon v. Kimball*, (*92 U. S., 362*), which arose under the Bankruptcy Law of 1867, the provisions of which so far as they deal with the questions involved in this case are substantially the same as the present law."

Scammon *v.* Kimball was an action by a policyholder against the assignee in bankruptcy of a fire insurance company and the complainant therein was allowed to set off the sum owing him on cer-

tain policies against the claim of the assignee for money on deposit with him as banker.

It is not in the report of Scammon *v.* Kimball that the learned Chief Judge finds authority for his assertion that the decision indicates an opinion by this Court on the same question that is involved herein. To quote his own language:

> "The report of the case does not show when the claim on the insurance policies matured, but that fact appears from opinions in two subsequent cases decided by the same court (*Carr v. Hamilton, 129 U. S., 249 (252); Scott* v. *Armstrong, 146 id., 499*), in which it is stated that the claim for fire losses in the Scammon case did not mature until after the *insolvency* of the insurance company."

The question before the Court is not whether a set-off of the character sought is permissible when the debt which is to be set-off was not matured at the time of the *insolvency;* the question for determination is whether a set-off is permitted when the claim which is to be set off was not matured when *the trustee in bankruptcy* took title to the assets of the insolvent.

Though the Insurance Company in *Scammon* v. *Kimball* was insolvent before the maturity of the obligation sought to be set-off, yet there is no statement in the report nor in the two subsequently decided cases referred to that would indicate that the obligation had not matured at *the time of the filing of the petition in bankruptcy,* and when recourse is had to the records of this court for the facts, they reveal a case which makes the decision utterly inapplicable to the appeal *sub judice.*

The printed record, exclusive of the briefs of counsel, in *Scammon* v. *Kimball,* is found in Vol. 5, October Term, 1875, page 3960 (Transcript of Records, 1875, on file in the office of the Supreme

Court, U. S.). On page 3966 of these records the answer to the original bill of the complainant Scammon contains the following uncontroverted statement:

> "That the petition to declare said Company bankrupt was filed in the District Court of the United States for the Northern District of Illinois by one Franklin McVeagh on the *20th day of January, A. D. 1872;* that said Company was on said petition adjudicated bankrupt by decree of said District Court on the 27th day of January, A. D. 1872."

Among the stipulated facts in the case we find, page 3969:

> "That at the time of the fire on the 8th and [illegible] days of October, A. D., 1871, J. Young Scammon (the complainant) held policies or contracts of insurance of the Mutual Insurance Company, upon which losses were then sustained to the amount of Forty-five Thousand Fifteen 33/100 dollars ($45,015.33), and that *that sum became due thereupon to said Scammon from said Company sixty days after notice, on proofs once* (the brief for appellant has '*at once*' which was doubtless the fact) made to said Company under such policies," etc.

It is therefore obvious that at the time of filing the petition in bankruptcy, *viz.*, the 20th day of January, 1872, three months and eleven days after the fire, all the conditions required to mature the obligation upon the policies had been performed, and the amount thereof was then due and payable, so that the equity jurisdiction exercised by the Court was the ancient and ordinary set-off of debts that were both due and payable before the intervention of the bankruptcy proceedings. The question whether the deposit held by the complainant could have been used as a set-off against the claim

of the trustee in bankruptcy in case the conditions required to mature the policies had not been performed at the time of the institution of the bankruptcy proceedings was, therefore, not before the court and certainly not decided.

We have never asserted that it is not permitted to a solvent creditor against whom exists a present claim to set-off against it an unmatured claim against his insolvent debtor, where the rights of the parties only are involved. This is the principle adverted to by the Judges in the *dicta* of their opinions in the cases referred to by Chief Judge Cullen. But when insolvency of one of the debtors and proceedings for the benefit of all his creditors intervene between the respective dates of maturity of the two debts, then there is, or there is not, a right of equitable set-off of the debts according to which of the two debts it is that matures before the bankruptcy.

In *Scott* v. *Armstrong* the question to be determined was whether a creditor with a present claim against an insolvent could precipitate the date of maturity of the claim the insolvent had against him. That principle is not involved in the appeal at bar. It constitutes an entirely different case.

The distinction is made obvious by the following from the opinion of Mr. Justice Peckham in the Court of Appeals of New York:

> "But where a debt is due from the *insolvent, and it is a debt from the other party to the insolvent which is not due,* the Court does not change the contract against the will of the parties, but it simply takes the waiver of the debtor whose debt is not yet due, and only by his consent and at his request treats it as due at once."
>
> *Richards* v. *LaTourette, 119 N. Y., 54, 59.*

And again:

> "It has been frequently held that, as to the right of set-off in equity, the fact that the debt owing to the insolvent is not due when he makes an assignment is entirely immaterial. The setting it up as off-set is a waiver by the debtor of any defense upon the ground that the debt is not due, and such waiver of right to demand the full time in which to pay his debt can lawfully and properly be made by *the debtor.*"

Opinion of the court per Peckham, *J.*, in *Rothschild* v. *Mack, 115 N. Y., 1, 8.*

We submit, with all respect, that Chief Judge Cullen was mistaken in the statement—

> "That the law of equitable set-off in the Supreme Court of the United States seems to be different from that which prevails with us."

*Schuler* v. *Israel* (*120 U. S., 506*), which he cites to substantiate his claim of a conflict of authority, states no different rule than that contained in *Fera* v. *Wickham et al., 135 N. Y., 223,* where on page 227 of the opinion Judge Gray says:

> "The natural equity in offsetting cross demands, which had its rise in the rule of the civil law, was soon adopted by the Court of Chancery in cases where, from the situation of the parties, cross actions at law were inadequate. Hence, if one of the parties should become insolvent, the insolvency was recognized as presenting a case for equitable interference. *But the rule was limited in its application to cases where the equitable rights of others were not interfered with.*"

And Judge Gray, in disposing of the issue actually before the court in *Fera* v. *Wickham,* stated the equitable doctrine in the following manner:

> "The question here is whether the plaintiff has an equitable right to an offset of his de-

> mand against the insolvent estate which had not matured at the time of the assignment, but which did subsequently mature before the demand held by the assignee againt him matured. In the solution of this question we might find some embarrassment in endeavoring to reconcile expressions of opinion by the judges in earlier cases, and after a very careful consideration I am disposed to hold that by an assignment in trust for the assignor's creditors, what natural equities previously existed become suspended by an intervention of the rights of other creditors."
>
> *Fera* v. *Wickham et al., 135 N. Y., 226, 227.*

The apparent misapprehension in the mind of Chief Judge Cullen that there exists any conflict between the decisions of this court and the Court of Appeals on the subject of equitable set-off seems to issue from the case of Carr *v.* Hamilton, in which this court in treating of the present value of life insurance policies as property and objects of set-off established a different rule from that which had been held by the Court of Appeals of the State of New York. This view did not arise from any difference of opinion as to the law involved with regard to equitable set-off, but was predicated upon a difference in the manner in which the respective courts regarded the cash surrender value of a policy.

In *Carr* v. *Hamilton,* the appellant supported his contention by the case of *Newcomb* v. *Almy, 96 N. Y., 308.* The following excerpt from the opinion of this Court, delivered by Mr. Justice Bradley, clears up the difficulty experienced by Chief Judge Cullen in contrasting the decisions:

> "That case (*Newcomb v. Almy*) was almost parallel with the present one, and the claim of setoff was disallowed. The suit was brought by the receiver of an insolvent

> life insurance company against the holder of an endowment policy issued by the company to recover the amount of a promissory note. The defendant, as in this case, sought to set off the value of his policy against the note. The policy was not yet due and in case the defendant died before it became due the amount was payable to his wife. The court assumed that the interests of the assured and his wife were so involved together that they could not be separated; and that it did not yet appear who would be entitled to the insurance,—not adverting to the fact that the interests of all the parties became fixed by the insolvency of the company, and must be computed as expectancies reduced to present values. It is true, the court does, in the next sentence, concede that the policy had a reserve value,—but asks, 'To whom was that value payable?' The plain answer was at hand, that the reserve value of each person's interest was payable to him or her. We cannot but think that if the true character of the interests in question had been brought to the attention of that learned court, it would have come to a different conclusion from that which was reached."

In like manner, if the true character of the principle of equitable set-off had been brought to the attention of the learned Court of Appeals, in the language of Mr. Justice Bradley, "it would have come to a different conclusion than that which was reached" in its recent decision. Neither the provisions of the Bankrupt Law nor the application of the doctrine of equitable set-off in the federal courts demanded or justified any variance from the principle of equitable set-off so clearly expressed in the New York cases and overwhelmingly sustained by almost every other jurisdiction in this country.

We have not been able to find a single federal authority which indicates in the slightest degree

a departure from the doctrine for which we have contended in this memorandum, and we, therefore, assert that the cases cited above establish the proposition we made at the outset, that an unmatured claim against the bankrupt cannot be used as an offset to a matured claim in favor of the bankrupt and against the claimant. This equitable doctrine should find application in bankruptcy cases because it is the only doctrine applicable to such cases. No other principle of set-off is known to courts of equity, and, according to the decisions of this court, under the Act of 1867, which are the only cases in point, the set-off of courts of bankruptcy is equitable set-off and nothing more.

## POINT II.

### The definition of the word "debt," in Section I, Subdivision 11, of the Bankrupt Act has no application to the phrase "mutual debts or mutual credits" when used in Section 68.

The learned Circuit Court of Appeals put its affirmance of the referee's decision on the ground that the right of set-off in bankruptcy was, by subdivision 11 of section I of the present act, enlarged and extended so that any counter debts or claims might be set-off in bankruptcy, if each of them could be proved in bankruptcy against the debtors, respectively. If correct, this ruling practically creates a new theory of set-off, which is quite at variance with any principle administered by courts of law or equity. It sweeps away the decisions of this court, under the act of 1867, and nullifies the equitable doctrine founded upon substantial justice.

If Congress had intended to enlarge the doctrine of set-off so as to enable the party to make a set-off in cases where the principles of legal and equitable set-off did not previously authorize it, we submit that appropriate words, evidencing such an intent, would have found their way into section 68 of the law, which would have been made to conform by apt expression to the English Statute of 6 George IV, c. 16, which expressly declares that "every debt or demand hereby made provable against the estate of the bankrupt may also be set-off in manner aforesaid against such estate" (sec. 50).

Even as a matter of mere technical etymology, the definition of the word debt in subdivision 11 of section I of the act can have no application to the phrase "mutual debts and mutual credits" in section 68. The inherent and necessary connotation of the word "mutual" is dual or plural. A "mutual debt" would be unthinkable and meaningless. The definition of the word "debt" is, therefore, useless in the interpretation of the phrase "mutual debts or mutual credits." The title to section I of the act declares that it is a definition, not merely of "words," but "words and phrases." There are in the section definitions of many phrases. If it had been intended to define the phrase "mutual debts or mutual credits" in a fashion contrary to the rulings of this Court, such a definition would have been inserted in section 68. Thus, although section I, subdivision 9, provides a definition for the word "creditor," the framers of the act deemed it also necessary to define (in subdivision 23) the phrase "secured creditor."

Again, section 63-a (1), which provides what claims are provable in bankruptcy, makes express provision for a method of proving unmatured obligations, by taking therefrom a rebate of interest, and if it were not for the words "whether then payable or not" in that section, it would have been questionable whether an unmatured obligation

against the bankrupt could have been proved, in view of the preceding language in the same section, to wit, "absolutely owing at the time of the filing of the petition against him." Therefore, in order to provide for the proving of an unmatured debt, Congress, for the purpose of making it a provable debt, rebated interest and, thereby, for the purposes of proof only, made it a matured one. If it had been the intention of Congress to provide that unmatured debts might be set-off, a similar provision would have been inserted in the set-off section to that inserted in the section relating to the proof of claims.

Our contention, under this point, in short, amounts to this: By the decisions of this Court, under the former Bankrupt Law, the phrase "mutual debts or mutual credits" has been defined. That definition involves an application of the general equitable doctrine of set-off. Had it been the intention of Congress to change the definition, such change would have been indicated by appropriate language contained in, or directly pertaining to, the set-off section itself.

*Libby* v. *Hopkins, supra;*
*Gray* v. *Rollo, supra;*
*Sawyer* v. *Hoag, supra;*
*Western Tie & Timber Co.* v. *Brown, 196 U. S., 502.*

## POINT III.

**The decrees of the Circuit Court of Appeals and District Court should be reversed and the case remanded to the District Court, with directions to disallow the proof of claim, unless**

**the claimant shall return to the trustee in bankruptcy the sum of $6,232.96, the amount of the balance on deposit to the credit of the bankrupt at the time of the filing of the petition in bankruptcy.**

Respectfully submitted,

MARTIN CONBOY,

Counsel for Appellee.

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## Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 54

Office Supreme Court U. S.
FILED
OCT 4 1905
JAMES H. McKENNEY,
Clerk.

IN THE MATTER

OF

PHILLIP SEMMER GLASS COMPANY, LIMITED,
*Bankrupt.*

MARTIN CONBOY, Trustee,
*Appellant,*

*against*

THE FIRST NATIONAL BANK OF JERSEY CITY,
*Claimant-Appellee.*

# BRIEF FOR APPELLEE ON MOTION.

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# UNITED STATES SUPREME COURT.

In the Matter

of

Phillip Semmer Glass Company, Limited,

Bankrupt.

---

Martin Condoy, Trustee,

Appellant,

vs.

First National Bank of Jersey City,

Respondent.

## BRIEF FOR APPELLEE ON MOTION.

This is a motion to dismiss or affirm, submitted under Rule Six of this Court.

The appeal herein by the Trustee of the above named bankrupt was allowed by a justice of this Court upon the certificate of such justice "that in his opinion the determination of the question or questions involved in the allowance or rejection of the claim of the First National Bank of Jersey City is essential to a uniform construction of the Bankrupt Law throughout the United States." This certificate was "made conformably to act of Congress of July 1, 1898, § 25-6, paragraph 2."

## Statement.

At the time of the filing of the petition in bankruptcy against the Phillip Semmer Plate Glass Company, Limited, that company, then and theretofore a dealer with the First National Bank of Jersey City, had on deposit with the Bank a balance to its credit of $6,232.96. At the same time the Bank held promissory notes to a larger amount on which the Glass Company was liable as indorser, which had been discounted by the Bank for account of the Glass Company but had not then matured.

The Bank applied this sum in its hands to the payment of these notes *pro tanto* and proved its claim against the bankrupt for the balance.

The Trustee, in September, 1903, petitioned for a reconsideration of the claim, and after proofs taken and hearing had, the Referee made an order, of May 13, 1904, allowing the claim, and affirming the right to set off, which the trustee had contested.

This allowance was affirmed by order of the District Court, of June 7, 1904, after hearing, upon the Trustee's petition of review.

From the District Court's order of affirmance the Trustee appealed to the Circuit Court of Appeals. The appeal was fully argued, and, upon affirmance of the District Court, an opinion was delivered, stating the grounds of the decision and affirming the right of set off.

Upon this decision, the order or decree of the Circuit Court of Appeals, allowing the claim of the Bank, was entered January 23, 1905.

Subsequently the Trustee made a motion in the Circuit Court of Appeals to recall the mandate issued to the District Court upon the above affirmance, and to vacate the order therefor. This motion was denied by order of April 25, 1905.

Thereafter the Trustee petitioned the Circuit Court of Appeals for a re-hearing of the appeal in that Court, and the application was denied by order of May 24, 1905.

The present appeal, which was allowed May 27, 1905, is from these three orders of the Circuit Court of Appeals, viz.—

1. Order, January 23, 1905, affirming allowance of claim.
2. Order, April 25, 1905, denying motion to recall mandate.
3. Order, May 24, 1905, denying petition for re-hearing.

**POINT FIRST. The motion to dismiss should be granted, as there is no jurisdiction to entertain this appeal.**

The only authority for the present appeal is found in the following provisions:—

Bankrupt Law, Section 25:—

"*b.* From any final decision of a court of appeals, *allowing or rejecting a claim* under this act, an appeal may be had under such rules and *within such time* as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

* * * * * *

"2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

General Orders in Bankruptcy, XXXVI:—

"2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals * * * shall be taken *within thirty days* after the judgment or decree, and shall be allowed by a judge of the court appealed from or by a Justice of the Supreme Court of the United States."

It is obvious that the *only* appeal which is permitted to be taken to the Supreme Court herein, under these provisions, is an appeal from the order or decree of the circuit court of appeals "allowing or rejecting a claim," and that such appeal must be taken "within thirty days" after such order or decree.

The order or decree of the circuit court of appeals allowing the present claim was entered January 23, 1905.

The present appeal was allowed May 27, 1905.

Therefore the present appeal was taken more three months after the expiration of the time allowed.

The appeal from the order of the Circuit Court of Appeals denying the motion to recall its mandate, would be under the same ban,—as that order was made April 25, 1905, more than thirty days prior to the appeal of May 27, 1905,—if such an appeal could be taken at all. But there is no authority for such an appeal in any case.

The appeal from the order of the Circuit Court of Appeals denying the petition for a rehearing would not lie in any case. Such motion is addressed wholly to the discretion of the court, and its purpose is only to afford the court to which it is addressed an opportunity to correct its own errors. It is designed to obviate the necessity for an appeal; not to lay the foundation for an appeal.

The allowance of the appeal and the certificate of the Justice of this Court cannot alter the situation. The certificate merely declares that there is ground for an appeal in the nature of the questions involved. But its effect is expressly subject by the terms of the statute to the provision that the appeal founded on such certificate must be had, or taken, "within such time as may be prescribed by the Supreme Court of the United States," and this Court has limited that time to thirty days. And the formal allowance of the appeal is no adjudication that the appeal is taken in time. Whether it was or was not taken in time is a question for this Court. It is not to be imagined that any Justice of the Court in the mere allowance of an appeal is assuming to exercise or has any power to exercise any jurisdiction to prejudge this question.

The limitation of time fixed by General Orders under the authority of the statute has the same effect as if that time had been fixed in the first instance by the statute itself. The purpose of this limitation of thirty days is patent enough; it is intended to prevent the tying up of bankrupt estates by prolonged litigations over disputed claims. The importance of such limitation is well illustrated in the present instance

where the litigation over the claim of this Bank, initiated in September, 1903, and decided by the Circuit Court of Appeals in January, 1905, still awaits, through this appeal, its final determination.

**POINT SECOND. The motion to affirm should be granted, as no question is presented upon this appeal which is not already fully settled in the appellee's favor.**

It was held by this Court in *N. Y. County Bank v. Massey*, 192 U. S., 138, that the holding by a bank on the one hand of monies deposited by the bankrupt and subject to check, and on the other hand of promissory notes upon which the bankrupt was liable constituted a case of mutual debts or mutual credits which were the proper subject of set off. "Section 68*a* of the bankruptcy act of 1898 is almost a literal reproduction of section 20 of the act of 1867. So far as we have been able to discover the *holdings were uniform* under that act that set off should be allowed as between a bank and a depositor becoming bankrupt." "There is nothing in the findings to show fraud or collusion between the bankrupt and the bank with a view to create a perpetual transfer of the bankrupt's property to the bank, and in the absence of such showing we cannot regard the deposit as having other effect than to create a debt to the bankrupt and not a diminution of his estate."

The only particular in which the appellant seeks to differentiate the present case from *N. Y. County Bank v. Massey*, is in the fact that the notes held by the First National Bank had not matured at the time when the petition in bankruptcy was filed.

This presents only the additional question whether the claim of the First National Bank against the Phillip Semmer Glass Company, upon notes which had not matured at the date of bankruptcy was within the contemplation of section 68 of the Bankrupt Law.

That section reads :—

"*a.* In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

"*b.* A set-off or counter-claim shall not be allowed in favor of any debtor of the bankrupt which (1) is not *provable* against the estate."

Clearly, then, debts which are "provable" are proper subject of set off.

Debts provable against the estate are thus defined by section 63 of the Bankrupt Law :—

"(1) A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, *whether then payable or not*, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were then not payable and did not bear interest;" "(4) founded upon an open account, or upon a contract express or implied."

The claim of the First National Bank of Jersey City against this bankrupt was thus provable by the express terms of the act, and would be discharged by the discharge of the bankrupt.

Upon this point there is no lack of uniformity of decision. In *Moch v. Market Street National Bank*, 107 Fed. Rep., 897, it is said of the liability of a bankrupt endorser of commercial paper which did not become absolute until after the filing of the petition in bankruptcy, that it "is within the very words of this fourth subdivision", citing *Martin v. Cole*, 104 U. S. 30, that it is an "express contract" and that "its terms are certain, fixed, and definite."

The Circuit Court of Appeals in its opinion in the present case says that the argument of the Trustee, the appellant, "entirely disregards section I subdivision 11 of the Bankruptcy Act, which provides that the word 'debt' when used in said act 'shall include any debt, demand, or claim provable in bankruptcy.' That meaning must be given to the word when used in the set-off Section. * * * To determine therefore whether the holder of a claim is entitled to the benefit of section 68 it is necessarily only to enquire whether his clain is one provable in bankruptcy.

We concur with the Court of Appeals for the Third Circuit (*Moch v. Market St. Nat. Bank*, 107 F. R. 897) in the conclusion that the liability of a bankrupt endorser of commercial paper which did not become absolute till after the filing of the petition is a debt provable in bankruptcy."

The uniformity of decision upon this point is recognized in *Frank v. Mercantile National Bank*, 182 N. Y. 264, 267, where it is said by *Cullen*, C. J.: "The argument is that as unmatured claims against the bankrupt are provable against his estate, they necessarily are the subject of set-off under the provisions of section 68. We think that this position is well taken, but we shall refrain from entering into any discussion of the question, as the proposition seemed to be *settled* by decisions of the Federal Courts. The *uniform current of authority* of the District and Circuit Courts of the United States is to that effect and the law is so stated in the text books on bankruptcy. (*Re City Bank of Savings*, Fed. Cas. No. 2,742; *Ex parte Howard Nat. Bank*, Fed. Cas. No. 6,764; *Re Kalter*, 2 N. B. N. R. 264; *Re Little*, 6 Am. B. R. 681; *Myers v. Dickenson*, 5 Am. B. R. 595; *Union Nat. Bank v. McKay*, 2 N. B. N. R. 913; *Re Phillip Semmer Glass Co.* 11 Am. B. R. 665; Collier on Bankruptcy [4th ed.], p. 498; Brandenburg on Bankruptcy, § 1131.) Moreover the very point seems to have been decided by the Supreme Court of the United States in *Scammar v. Kimball* (92 U. S. 362), which arose under the Bankrupt Law of 1867, the provisions of which, so far as they deal with the questions involved in this case, are substantially the same as the present law. (*N. Y. County Bank v. Massey*, 192 U. S. 138.) That was an action against the assignee in bankruptcy of a fire insurance company. The complainant was allowed to set off the sums owing him on certain policies as against a claim of the assignee for money on deposit with the complainant as a banker. The report of the case does not show when the claim on the insurance policies matured, but that fact appears from the opinions in two subsequent cases decided by the same court. (*Carr v. Hamilton*, 129 U. S. 249; *Scott v. Armstrong*, 146 *id.* 499), in which it is stated that the claim for fire losses in the *Scammar* case did not mature until after the insolvency of the insurance company."

The decision in *Western Tie and Timber Co. v. Brown*, 196 U. S. 502, has absolutely no bearing whatever upon the question presented by this appeal.

In that case Harrison, the bankrupt, and certain laborers, all in the employ and under the pay of the Tie Company, were engaged in the work of removing timber from the lands of the Company and converting it into ties, which the Company sold.

Harrison established stores in which he furnished groceries and other supplies to the laborers. The Company deducted periodically from the earnings of each laborer the amount due from the laborer to Harrison for such supplies and paid it over to Harrison, paying the balance of such earnings directly to the laborer.

During the two months prior to the bankruptcy the Company deducted, as before, the amounts due by laborers to Harrison for such supplies from their total earnings, but refused to pay these amounts over to Harrison, and claimed to apply them on account of Harrison's debt to the Company.

It was held that the money so deducted represented the indebtedness of the laborers to Harrison, that as to such deductions the Company stood to Harrison in the relation of trustee, and was under obligation to remit the money to him, regardless of any debt he might owe to the Company "and, therefore, the case was not one of mutual credits and debts."

That is to say, the Company's possession of money belonging to Harrison, acquired by Harrison's consent for the sole and specific purpose of transmitting it to Harrison in payment of the laborers' debts to Harrison, did not give the Company any legal right, without Harrison's consent, to appropriate the money to its own use and apply it upon Harrison's debt to the Company. And it is pointed out that if this had been done *with* Harrison's consent, while the Company knew Harrison to be insolvent, it would have constituted an unlawful preference.

This decision is simply an application of the fundamental principle that set-off is only available where the debts and credits are *mutual*, that is between the same parties; and that a debt of C to A is not available as a set-off to a debt of A to B. It has nothing to do with the proposition that debts which

have not matured are the subject of proof and off-set under the Bankrupt Law.

**POINT THIRD. The appellee should be awarded such redress as it is in the power of this Court to grant, in view of the delay and expense to which it has been exposed.**

The claim has been in litigation for two years. It has been upheld successively by the Referee, the District Court, and the Circuit Court of Appeals; and in the latter court there have been, in effect, two further affirmances, one on motion to recall the mandate, and one on petition for rehearing.

Then, after the time for appeal had expired the appellant ignoring that fact and assuming a diversity of decisions which does not exist, has procured the allowance of an appeal to this Court, presenting no question which is open to dispute or is not already well settled.

It is obvious that appellee can receive no compensation from the estate of the bankrupt for all its expenses and loss of interest. If this litigation had been promoted by a private suitor, security would have been exacted. The Trustee has taken advantage of his official position to prosecute these appeals without security, other than that afforded by his official bond.

The trustee in bankruptcy is trustee for all the creditors. And while it is his duty to object to the proof of claims which are not lawfully allowable, he is not ordinarily justified in doing more than securing due and full consideration of the questions presented and the determination of the bankruptcy court thereon. That determination affords the rule for his guidance and protection, and establishes his duty to the creditor.

The general rule is that if a trustee goes further than this, and contests the rights of his *cestui que trust* after they have been judicially established, by the court of which he is an officer, he does so at his peril.

It is respectfully submitted that this is a proper case for the exercise of the power of this Court to award damages for delay.

As was said in *Whitney v. Cook*, 99 U. S., 607, "Parties should not be subjected to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation for the loss occasioned by an unwarranted delay ought not to be overlooked."

WILLIAM G. WILSON,
Of counsel.